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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT BARRY ROBERTS, Defendant and Appellant.	A127238 (Humboldt County Super. Ct. No. CR090637S)

Appellant Robert Barry Roberts entered a plea of no contest to possession of heroin (Health & Saf. Code, § 11350, subd. (a)) and received an agreed upon sentence of 16 months in state prison. At the time of sentencing, Roberts received custody credit of 474 days for time served. He contends that he is entitled to retroactive application of subsequent amendments to Penal Code section 4019,[1] providing for additional custody credits. We agree and order modification of his sentence accordingly.

I. BACKGROUND

The facts underlying Roberts's conviction are of little significance to our discussion. Roberts was arrested on February 2, 2009, by Eureka police as a parolee at large. Four bindles of what was later identified as heroin were found in the back seat of the patrol car in which Roberts had been transported.

On December 15, 2009, Roberts, proceeding in propria persona, entered a plea of no contest to a single count of possession of heroin (Health & Saf. Code, § 11350,

[1] All subsequent code references are to the Penal Code unless otherwise indicated.

subd. (a)) in exchange for an agreed upon sentence of 16 months in state prison and dismissal of sentence enhancement allegations under section 667.5, subdivision (b). He waived preparation of a presentence probation report and was sentenced in accordance with the plea agreement to the 16-month state prison term. He received 316 days credit for actual time spent in presentence custody, and additional "good time" credits of 158 days pursuant to the then operative version of section 4019.

The sole issue presented by this appeal is whether Roberts is entitled to custody credit for an additional 158 days by virtue of amendments to section 4019 which became effective in January 2010.[2] We hold that the amendments have retroactive effect, and that Roberts is entitled to receive the additional credits.

II. DISCUSSION

Under the version of section 4019 in effect at the time that Roberts was sentenced, a defendant earned two days of credit for every *four* days of custody unless he failed to perform assigned work or abide by the facility's reasonable rules and regulations. (Former § 4019, subds. (a)(4), (b), (c), (f), as amended by Stats. 1982, ch. 1234, § 7, p. 4553.) The amendments to section 4019 which are at issue, with certain exceptions not applicable here, increase the good conduct credits a defendant can receive for presentence custody. Effective January 2010, section 4019 provided for up to two days of credit for every *two* days of custody under the same conditions. (Former § 4019, subds. (a)(4), (b)(1), (c)(1), (f), as amended by Stats. 2009–2010, 3d Ex. Sess. 2009, ch. 28, § 50.)[3]

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[2] Roberts's counsel advises us that Roberts has already served his sentence, and was paroled in January 2010. He contends that the issue is nevertheless not moot, because application of retroactive credit will reduce his parole period. (§ 1170, subd. (a)(3); *In re Sosa* (1980) 102 Cal.App.3d 1002, 1005–1006.) The People agree.

[3] Sections 4019 and 2933 have been further amended by urgency legislation, operative on September 28, 2010. (Stats. 2010, ch. 426, § 2.) The September 2010 amendments do not affect this case and do not change our analysis in this matter. Unless otherwise noted, all subsequent references to section 4019 or its amendments refer to section 4019, as amended by Statutes 2009–2010, 3rd Extraordinary Session 2009, chapter 28, section 50.

Numerous, and conflicting, decisions have been published addressing the retroactive application of the amendments to section 4019. The People argue the amendments do not apply retroactively, citing *People v. Eusebio* (2010) 185 Cal.App.4th 990, review granted September 22, 2010, S184956, *People v. Hopkins* (2010) 184 Cal.App.4th 615, review granted July 28, 2010, S183724, and *People v. Otubuah* (2010) 184 Cal.App.4th 422, review granted July 21, 2010, S184314. (See also *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808.)

In *People v. Pelayo* (2010) 184 Cal.App.4th 481 (*Pelayo*), review granted July 21, 2010, S183552, we joined several other courts of appeal in holding that the amendments to section 4019 does apply retroactively because it is an amendatory statute that mitigates punishment. (See also *People v. Jones* (2010) 188 Cal.App.4th 165, 183; *People v. Bacon* (2010) 186 Cal.App.4th 333, review granted Oct. 13, 2010, S184782; *People v. Keating* (2010) 185 Cal.App.4th 364, review granted Sept. 22, 2010, S184354; *People v. Norton* (2010) 184 Cal.App.4th 408, review granted Aug. 11, 2010, S183260; *People v. Landon* (2010) 183 Cal.App.4th 1096, review granted June 23, 2010, S182808; *People v. House* (2010) 183 Cal.App.4th 1049, review granted June 23, 2010, S182813; *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963.) As indicated, our Supreme Court has granted hearing in these cases and will ultimately decide the issue. Pending direction from the Supreme Court, we adopt and incorporate our discussion and reasoning in *Pelayo*, as set forth hereafter, and again hold that the statute must be given retroactive effect.

1. *Retroactivity of Penal Statutes in General*

The Penal Code provides that "[n]o part of it is retroactive, unless expressly so declared." (§ 3.) "That section simply embodies the general rule of construction . . . that when there is nothing to indicate a contrary intent in a statute it will be presumed that the Legislature intended the statute to operate prospectively and not retroactively." (*In re Estrada* (1965) 63 Cal.2d 740, 746 (*Estrada*).) The rule, however, "is not a straitjacket" and "should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent" even if the Legislature has not expressly stated that a statute

should apply retroactively. (*Ibid*.) In *Estrada*, the Supreme Court considered the particular circumstance of a penal statute that lessens the punishment for a crime but does not include an express statement that the statute was to apply retroactively. (*Id.* at pp. 743–744.) In that situation, the court concluded, the inevitable inference is "that the Legislature must have intended, and by necessary implication provided, that the amendatory statute should prevail. When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. . . . This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology," which instruct that punishment is directed toward deterrence, incapacitation, and rehabilitation, but not "punishment for its own sake." (*Id.* at pp. 744–745.) Accordingly, "where the amendatory statute mitigates punishment and there is no saving clause [requiring only prospective effect], the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." (*Id.* at p. 748.) That is, it will apply to all judgments of conviction that are not yet final on direct review. (*Id.* at p. 744.)

In 1996, the Supreme Court expressly reaffirmed the *Estrada* rule. (*People v. Nasalga* (1996) 12 Cal.4th 784, 792, fn. 7 (*Nasalga*).) In a prior case, the court had suggested that the rationale of *Estrada* had been undermined by further developments in penology in this state. (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1045, fn. 1, citing § 1170, subd. (a)(1) ["Legislature finds and declares that the purpose of imprisonment for crime is punishment"].) In *Nasalga*, however, the court rejected an invitation to reconsider *Estrada* in light of this change in penological theory. "In the 31 years since this court decided *Estrada*, . . . the Legislature has taken no action, as it easily could have done, to

abrogate *Estrada*."[4] (*Nasalga*, at p. 792, fn. 7.) In short, in *Nasalga* the court reaffirmed the *Estrada* rule on the ground of legislative acquiescence, regardless of the continuing persuasiveness of the *Estrada* rationale. (Cf. *People v. Meloney* (2003) 30 Cal.4th 1145, 1161 (*Meloney*) [" ' "[when] a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it" ' "].) After *Nasalga*, it is no longer open to debate whether the *fact* that the Legislature enacted a statute that mitigates punishment supports an inference that the Legislature *intended* the statute to apply retroactively. (*Nasalga*, at p. 792, fn. 7.)

2. *Retroactivity of Statutes Increasing Custody Credits*

In at least four prior decisions long predating the current amendments, courts of appeal have held that the *Estrada* rule applied to amendments increasing the credits a defendant could receive for presentence custody. (*People v. Hunter* (1977) 68 Cal.App.3d 389, 391–393 (*Hunter*); *People v. Sandoval* (1977) 70 Cal.App.3d 73, 87–88 (*Sandoval*); *People v. Doganiere* (1978) 86 Cal.App.3d 237, 238–240 (*Doganiere*); *People v. Smith* (1979) 98 Cal.App.3d 793, 798–799 (*Smith*).) As far as we are aware, no published decisions have held to the contrary. In *Hunter*, the issue was whether amendments to section 2900.5, which allowed credit for actual time spent in presentence custody against sentences imposed as a condition of probation, applied retroactively to probationary sentences imposed prior to the effective date of the amendments. (*Hunter*, at p. 391.) Following *Estrada*, the court held the amendments applied retroactively to judgments that were not yet final on the effective date of the new law. (*Ibid.*) *Sandoval* agreed with and followed *Hunter* on the same issue. (*Sandoval*, at pp. 87–88.)

[4] Notably, during that 31-year period the Supreme Court had repeatedly followed and applied *Estrada*. (See, e.g., *People v. Francis* (1969) 71 Cal.2d 66, 75–76; *People v. Rossi* (1976) 18 Cal.3d 295, 298–300; *People v. Chapman* (1978) 21 Cal.3d 124, 126–127; *People v. Babylon* (1985) 39 Cal.3d 719, 721–722; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 300–301.)

In *Doganiere*, the issue was the retroactivity of amendments to section 2900.5 that authorized *conduct* credit (pursuant to § 4019) for time that had been served in jail as a condition of probation against a sentence later imposed after a violation of probation. (*Doganiere, supra,* 86 Cal.App.3d at pp. 238–239.) Following *Estrada* and *Hunter*, the court held the amendments were retroactive. (*Id.* at pp. 239–240.) In *Smith*, the court followed *Estrada* and *Doganiere* and held that 1979 amendments to section 4019 applied retroactively. (*Smith, supra,* 98 Cal.App.3d at p. 799.) In *Doganiere*, the court specifically rejected an argument that the amendments should not apply retroactively because conduct credits were an incentive for future inmate behavior, a goal that could only be accomplished through prospective application. (*Doganiere*, at pp. 239–240.) "It appears to us that in applying the principles of *Estrada*, as indeed we must, the Legislature simply intended to give credit for good behavior and in so doing, dangled a carrot over those who are serving time. It would appear to be fair, just and reasonable to give prisoner A, who has been a model prisoner and by reason thereof served only five months of his six-month sentence, credit for the full six months if we are going to give credit for the full six months to prisoner B, who is recalcitrant, hard-nosed, and spent his entire time violating the rules of the local jail." (*Ibid.*) We note that *Estrada* itself implicitly rejected a similar argument made by the dissent in that case, that retroactive application of a lessened criminal penalty undermines the deterrent effect of penal statutes. (See *Estrada*, *supra*, 63 Cal.2d at p. 753 (dis. opn. of Burke, J.).) *Doganiere* concluded, "Under *Estrada*, it must be presumed that the Legislature thought the prior system of not allowing credit for good behavior was too severe." (*Doganiere*, at p. 240.) Again, under *Nasalga*, the legitimacy of that inference is no longer open to debate. (*Nasalga*, *supra,* 12 Cal.4th at 792, fn. 7.)

The People contended in *Pelayo* that the reasoning of *Doganiere* is unsound, since the public purpose of good conduct statutes is to provide effective incentives for good behavior, and that this purpose can only be furthered by prospective application of additional credits. "Reason dictates that it is impossible to influence behavior after it has occurred." (*In re Stinnette* (1979) 94 Cal.App.3d 800, 806 (*Stinnette*).) *Stinnette*

considered an amendment to section 2931 under the Determinate Sentencing Act, which allowed prisoners to earn conduct credits but restricted application of the amendment to time served after the effective date. (*Stinnette*, at pp. 803–804.) The issue was whether the express prospective application of the statute violated equal protection. (*Id.* at p. 804.) The court concluded that it did not because there was a rational basis for treating those who had already begun serving their sentences differently from those who began serving their sentences after the effective date. (*Id.* at pp. 805–806.) Unlike *Stinnette*, the amendments to section 4019 at issue here do not specify the Legislature's intent regarding retroactive or prospective application. We find that *Stinnette* is not helpful in determining the Legislature's intent when amending section 4019.

The Legislature, which is presumed to have been aware of the *Hunter/Doganiere* case law, "has taken no action, as it easily could have done, to abrogate" these decisions in the more than 31 years since the last of them was decided. (Cf. *Nasalga, supra*, 12 Cal.4th at p. 792, fn. 7.) Moreover, the Legislature twice amended section 4019, in 1982 and 2009, without expressly providing that the amendments would apply prospectively only. (Stats. 1982, ch. 1234, § 7, p. 4553; Stats. 2009–2010, 3d Ex. Sess. 2009, ch. 28, § 50.) On these facts, we may infer that the Legislature has acquiesced in *Doganiere*. (See *Meloney, supra*, 30 Cal.4th at p. 1161.)

3. *Legislative Intent in 2009 Amendments of Section 4019*

As the People acknowledged in *Pelayo*, the Legislature, in enacting the amendments to section 4019, did not expressly declare its intent in doing so. The appellant in *Pelayo* asserted that an intent to retroactively apply the amendments can be discerned from the statement that Senate Bill 18 was enacted to "address[] the fiscal emergency declared by the Governor" (Sen. Bill 18, § 62) and that earlier release of prisoners would foster that purpose. However, the legislative intent at issue "is not the *motivation* for the legislation" but rather "the Legislature's intent concerning whether the [enactment] should apply prospectively only." (*Nasalga, supra*, 12 Cal.4th at p. 795). The statute's purpose of saving state funds by reducing prison population while at the

same time minimizing security risk is at least as consistent with retroactive as with prospective application of the amendments to section 4019.

The appellant in *Pelayo* also contended that the express use of a saving clause in other statutes amended by the same legislation (Sen. Bill 18, § 41[5]; § 2933.3, subd. (d) [providing additional custody credits for prison inmate firefighting training or service only for those eligible after July 1, 2009]) compels a conclusion that the Legislature intended retroactivity for amended section 4019. The Legislature's inclusion of a saving clause in the amendment to section 2933.3, but not in the amendments to section 4019, supports an inference that the Legislature had a different intent with respect to the retroactive or prospective application of the two provisions. (Cf. *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 62 ["use of differing language in otherwise parallel provisions supports an inference that a difference in meaning was intended"].) The People urged that we could divine a contrary legislative purpose for only prospective application from the fact that the amendment to section 2933.3, subdivision (d) was expressly made partially retroactive, and the Legislature *failed* to do so here. We think that the Legislature's use of the phrase "shall *only* apply" in amending section 2933.3 (italics added), however, suggests an intent to *limit* the provision's retroactive application, rather than *extend* the provision's otherwise prospective application retroactively.

The appellant in *Pelayo* further argued that we could look to the Legislature's explicit recognition of inevitable delays in implementation of new custody credit calculations by the Department of Corrections and Rehabilitation (Sen. Bill 18, § 59) as evidence that the Legislature contemplated retroactive application of such credits. Section 59, an uncodified provision of Senate Bill 18, provides: "The Department of Corrections and Rehabilitation shall implement the changes made by this act regarding time credits in a reasonable time. However, in light of limited case management

[5] "The credits authorized in subdivisions (b) and (c) shall only apply to inmates who are eligible after July 1, 2009." (Stats. 2009–2010, 3d Ex. Sess. 2009, ch. 28, § 41.)

resources, it is expected that there will be some delays in determining the amount of additional time credits to be granted against inmate sentences resulting from the changes in law pursuant to this act. An inmate shall have no cause of action or claim for damages because of any additional time spent in custody due to reasonable delays in implementing the changes in the credit provisions of this act. However, to the extent that excess days in state prison due to delays in implementing this act are identified, they shall be considered as time spent on parole, if any parole period is applicable." (Stats. 2009–2010, 3d Ex. Sess. 2009, ch. 28, § 59.) While ambiguous, this section does tend to support an inference that the Legislative intended the provisions affecting custody credits to have retroactive effect.

Ultimately, however, we concluded that, in the absence of clear affirmative indications that the Legislature intended the amendments to section 4019 to have prospective application only, we must apply the *Estrada and Doganiere* presumption that the amendments are retroactive as to all sentences not yet final on direct appeal at the time the amendments went into effect. We found no clear expression of such an intent and thus held that the amendments must be applied retroactively.

4. *Conclusion*

Accordingly, we hold that Roberts is entitled to the benefits of the 2009 amendments to section 4019.[6]

III. DISPOSITION

The judgment is reversed as to the calculation of presentence custody credits only. On remand, the trial court shall revise its sentencing order and the abstract of judgment to reflect that Roberts earned 632 days of presentence custody credits pursuant to section 4019 and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

[6] The trial court, of course, cannot be faulted for applying the version of section 4019 in effect at the time of Roberts's sentencing.

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Bruiniers, J.

We concur:

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Jones, P. J.

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Simons, J.